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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/838,809	04/20/2001	Grant E. DuBois	04286.00010	3526
22852	7590	08/19/2004	EXAMINER	
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 1300 I STREET, NW WASHINGTON, DC 20005			PADEN, CAROLYN A	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 08/19/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	09/838,809	DUBOIS ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Carolyn A Paden	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 19 July 2004.
- 2a) This action is **FINAL**.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 13,14,16,17,19,20,23,26-28,31,34-37,40,42,43,54-102,106-110, is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 13,14,16,17,19,20,23,26-28,31,34-37,40,42,43,54-102,106-110 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
    - a) All    b) Some \* c) None of:
      1. Certified copies of the priority documents have been received.
      2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
      3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                    | Paper No(s)/Mail Date. _____.   |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____. | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
|   | 6) <input type="checkbox"/> Other: _____.                                   |

The rejection of the claims under 35 USC 112 has been dropped because the rejected claims were cancelled.

Applicants' Declaration filed under 35 USC 131 has been considered but is not effective to swear behind the Stefandl or Broz reference because the laboratory notebook page does not provide for all of the features of the claims. In particular the laboratory notebook does not show a high potency non-caloric sweetener.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 13, 14, 16, 17, 23, 26-29, 31, 34-37, 42, 43, 54-90 are rejected under 35 U.S.C. 102(e) as being anticipated by Broz (2002-0197376) for reasons of record..

Applicant addressed this rejection by providing a declaration under 35 USC 1.131. This declaration and data does not alone overcome the

rejection because there are no high intensity sweeteners in the provided lab notebook pages. The notation in the column to “need to incl sweetness” does not provide evidence of reduction to practice.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 23, 64-67, 69, 71, 73 and 76 are rejected under 35 U.S.C. 103(a) as being unpatentable over Stefandl (2002/0136803) for reasons of record used in rejecting the claims under 35 USC 102(e) in view of Beyts.

Stefandl discloses a freezer altering additive composition for use with commercial beverages. The composition is made from a 1) carbohydrate, 2) glycerol or propylene glycol and 3) a sugar alcohol such as sorbitol and erythritol. The beverages are ready to drink compositions such as cola and cream soda (paragraph 33). The freeze altering composition is simply added to the bottle and the bottle is tossed into the freezer (note sample D at paragraph 53). Although not specifically stated, cola and cream soda are well known in the art to be carbonated beverages. The dispenser, in this case, is the bottle in the freezer. The claims appear to differ from

Stefandl in the recitation of the inclusion of a high intensity sweetener in the product and in the recitation that sugar alcohols are sweeteners. Beyts teaches that sucralose is a high intensity sweetener that has a synergistic relationship with sweet saccharides. Beyts also shows that sugar alcohols are sweeteners. Thus one of ordinary skill in the beverage art would have been able to modulate the sweetness of Stefandl by adjusting the amount and type of sweetener in the product. It is appreciated that the given freezing point of the product is not mentioned in the reference. But no difference is seen between the freezing point of the beverage of the claims and the freezing point of Stefandl.

Applicant addressed this rejection by providing a declaration under 35 USC 1.131. This declaration and data does not alone overcome the rejection because there are no high intensity sweeteners in the provided lab notebook pages. The notation in the column to “need to incl sweetness” does not provide evidence of reduction to practice.

Claims 13, 14, 20, 23, 28, 31, 37, 43, 54-90 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich (3,826,829) in view of Beyts (5,380,541) for reasons of record used in rejecting claims 4, 5, 21, 24, 26-29, 32-36, 47-52, 64-81.

Marulich discloses a slush beverage that is carbonated and is formed with water, sugars, polyols, flavor and coloring agents (see abstract). At column 3, lines 52-62, the concept of using polyhydric alcohols, such as glycerol, sorbitol and propylene glycol and combinations thereof is indicated. These polyhydric alcohols are termed "freezing point depressant material" at column 2, lines 52-55. Carbonation of the beverage is additional shown at column 4, lines 1-4. Claim 13 appears to differ from Marulich in the recitation of the inclusion of a high potency non-caloric sweetener in the product and in the recitation of a low calorie sugar as a freezing point depressant. Beyts teaches the combination of sweeteners that include high intensity sweeteners. Beyts also shows that sorbitol is a sweetener (see Table at column 4, lines 36-49). Thus it would have been obvious at the time of applicants invention to utilize the high intensity sweetener of Beyts to modify the sweetness of Marulich while maintaining a beverage with a desired depress freezing point.

Claims 16, 17, 26, 34, 40 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts as applied to claims 13, 14, 20, 23, 28, 31, 37, 43, 54-90 above, and further in view of Cole for reasons of record.

Marulich discloses a slush beverage that is carbonated and is formed with water, sugars, polyols, flavor and coloring agents (see abstract). At column 3, lines 52-62, the concept of using polyhydric alcohols, such as glycerol, sorbitol and propylene glycol and combinations thereof is indicated. These polyhydric alcohols are termed "freezing point depressant material" at column 2, lines 52-55. Carbonation of the beverage is additional shown at column 4, lines 1-4. Claim 13 appears to differ from Marulich in the recitation of the inclusion of a high potency non-caloric sweetener in the product. Claim 16 appears to differ from Marulich in the recitation that the low calorie sugars are freezing point depressants.

Beyts teaches the combination of sweeteners that include high intensity sweeteners. Beyts also shows that sorbitol is a sweetener (see Table at column 4, lines 36-49). Cole teaches that saccharides and sugar alcohols are well known to depress the freezing point of edible formulations (column 1, lines 21-35). Thus it would have been obvious at the time of applicants invention to utilize the high intensity sweetener of Beyts to modify the sweetness of Marulich while maintaining a beverage with a desired depress freezing point.

Claims 19, 27 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts and further in view of Cole as applied to the rejected claims above, and further in view of DeCock for reasons of record.

The claims appear to differ from Marulich in view of Beyts and further in view of Cole in the recitation that erythritol is a sugar alcohol. This evidence is provided by De Cock (column 1, lines 21-35). Thus with the references before him, one of ordinary skill in the art would have recognized that the polyhydric alcohols of Marulich included the sugar alcohols of Cole and the erythritol of deCock as a suggested freezing point depressant.

Claims 91-102 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts and further in view of Cole as applied to the claims rejected above, and further in view of Anderson for reasons of record.

The claims appear to differ from Marulich in the use of tagatose. Anderson discloses that tagatose is a well-known non-caloric sweetener that can be used in beverages and also has synergistic sweetening when combined with other non-caloric sweeteners. It would have been obvious at

the time of applicants' invention to utilize tagatose as a non-caloric sweetener in the composition of Marulich in order to provide sufficient sweetness to the product without adding a lot of calories.

Newly submitted claims 106-110 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons:

The claims are drawn to a beverage that is a mineral fortified beverage which mineral is a separate ingredient species that would require a separate search and also separate consideration.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 106-110 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Claims 20, 28, 36, 43, 58-63, 67-72, 76-81, 85-9097-102, 106-110 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter, which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the

application was filed, had possession of the claimed invention. The recitation “mineral salt” does not appear to be in the specification as it was originally filed. Also examiner cannot find a basis in the original specification for the inclusion of tagatose. With regard to claims 20, 28, 36, 43, 58-63, 67-72, 76-81, 85-90 examiner cannot find a basis in the original specification for the non-caloric sweeteners acesulfame-K, cyclamate or sucralose. Page 11 of applicant’s specification does not appear to contain all of these ingredients.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the

mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

*Carolyn Paden*  
CAROLYN PADEN 8-17-04  
PRIMARY EXAMINER  
GROUP 1300-1761